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Supreme Court, U.S.
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No. 09-41

In The

Supreme Court of the United States

JUAN FRANCISCO LUNA-HERNANDEZ,

Petitioner,

vs.

ERIC H. HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN SHAIKEN, ESQ.
Counsel of Record
LAW OFFICES OF STEPHEN SHAIKEN
170 Columbus Avenue, Suite 100
San Francisco, CA 94133
Telephone: (415) 248-1012
Fax: (415) 248-0019

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner is a citizen and national of Mexico who entered the United States without inspection in 1987. He was placed into removal proceedings and applied for cancellation of removal as a non permanent resident, as authorized by § 240A(b) of the Immigration and Nationality Act [8 U.S.C. § 1229A(b)]. Petitioner seeks review in this Court because of the significance of the issue and the fact that three circuits have issued precedent decisions which would not have allowed a Board reversal in this instance.

1.) Does 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii) preclude reversing a grant of cancellation of removal where the immigration judge made specific and detailed factual findings supporting exceptional and unusual hardship, and where the Board of Immigration Appeals did not determine the factual findings to be clearly erroneous?

2.) May the Board of Immigration Appeals reverse an immigration judge's grant of cancellation of removal under § 240A(b) of the Act [8 U.S.C. § 1229A(b)] where the immigration judge's finding of exceptional and extremely unusual hardship was supported by facts which the Board did not find to be error, but where the Board considered other facts?

3.) Is the Board of Immigration Appeals bound by factual findings made by the immigration judge, which the Board did not find to be clear error, or in the absence of such findings of error, must the Board accept the immigration judge's grant of cancellation?

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OPINIONS BELOW

The circuit court denied Petitioner's petition for review on November 27, 2008). (App. 1-3) A timely petition for rehearing was filed and it was denied on May 20, 2009. (App. 30)

STATEMENT OF BASIS FOR JURISDICTION

This Court retains jurisdiction for a petition for writ of certiorari pursuant to Supreme Court Rule 13.3 as this petition for writ of certiorari is filed within 90 days of the order denying the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Jurisdiction by this Court over the subject matter in question is found in Article 3, Section 2, of the Constitution extending judicial power to all cases arising under the Constitution and the Laws of the United States; Article 2, Section 8, grants Congress the exclusive authority to establish law governing naturalization. Additional authority is found in Amendment 5 of the Constitution which guarantees due process of law to all persons within the United States. The specific statutes at issue here are sections 240A(b) of the Immigration and Nationality Act [8 U.S.C. § 1229A(b)], and 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii).

The Solicitor General of the United States has been notified pursuant to Rule 29.4, as well as the Attorney General of the United States.

STATEMENT OF THE CASE

The immigration judge granted Petitioner's application for cancellation of removal as a non permanent resident pursuant to § 240A(b) of the Act [8 U.S.C. § 1229A(b)]. That statute allows an immigration judge to cancel removal proceedings and grant an alien lawful permanent residence where they prove ten years continuous physical presence for the ten year period preceding the commencement of removal proceedings, good moral character during that time, and that their removal would cause an exceptional and extremely unusual hardship to a qualifying relative who must be a spouse, minor child, or parent who is a citizen or lawful permanent resident. The term exceptional and extremely unusual hardship is not defined in the Immigration and Nationality Act. The Board has addressed the concept in three precedent decisions: *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). These cases agree that exceptional and extremely unusual hardship means a hardship significantly greater than that which is typical of removal of a family member.

The government appealed the grant of cancellation.

A three member panel of the Board of Immigration Appeals sustained the government's appeal with one dissent.

Petitioner sought review in the United States Court of Appeals for the Ninth Circuit, and the petition was denied as to the issues raised in this petition. Petitioner sought rehearing en banc and was denied.

IMMIGRATION JUDGE'S DECISION AND FACTUAL FINDINGS

The immigration judge found Petitioner to be fully credible and accepted his testimony as true. (App. 13) She found that Petitioner, who entered the United States in May, 1987, satisfied the statute's requirements of continuous physical presence and good moral character. (App. 14, 15)

The immigration judge reviewed the three precedent decisions of the Board on exceptional and extremely unusual hardship. (App. 16-20) The immigration judge found that the acts of this case brought it closer to *Matter of Recinas*, where cancellation was granted, than to *Monreal* and *Andazola*, where the Board found no exceptional and extremely unusual hardship. (App. 20)

The immigration judge made several specific factual findings in support of the grant of cancellation

and the exceptional and extremely unusual hardship to Petitioner's three citizen children.

The immigration judge found that in April, 2000, Petitioner purchased for $10,000 a landscaping business in Lake Tahoe, California, the community where he resided since coming to the U.S.; by 2002, the business was grossing $600,000, and Petitioner was earning $150,000. He had paid $35,000 in taxes and his business generated several jobs. (App. 20) His assets were approximately one million dollars, including the good will value of his business and his home. (App. 21)

The legal relatives in Petitioner's immediate and extended family included his three citizen children, ages five, six, and twelve, his in-laws, a brother-in-law, and ten of his children's cousins. (App. 21)

The immigration judge found that the children could speak Spanish, but had never been educated in that language and could not read and write Spanish. (App. 21) The immigration judge found that removing the children from the American school system and its instruction in English would disadvantage them if they wanted to attend college in their native land. (App. 25)

The immigration judge found that these children were entirely dependent upon Petitioner (App. 24), that Petitioner's lack of adult work experience in Mexico would disadvantage him in seeking work to support his family if removed to Mexico (App. 23), that the children's loss of a significant economic

status was a factor is finding exceptional and extremely unusual hardship (App. 25), as Petitioner could not achieve the same or similar level of success in Mexico that he had achieved in the U.S. (App. 26) The judge also found the existence of a close knit family. (App. 24)

Based on these factual findings and the legal analysis, the immigration judge found exceptional and extremely unusual hardship to the three children and granted cancellation of removal. (App. 26, 28) The government appealed.

DECISION OF THE BOARD OF IMMIGRATION APPEALS

The Board of Immigration Appeals reviewed the immigration judge's findings in part. (App. 5-6) The Board then stated that both Petitioner and his wife were in good health and would be physically able to support their children in Mexico. (App. 7) The Board said there was no objective evidence that Petitioner and his wife could not find employment in Mexico. (App. 7) The Board noted the one million dollars in assets which it said could facilitate settlement in Mexico. (App. 7) The Board dismissed the finding that loss of stature achieved in the U.S. was a factor supporting exceptional and extremely unusual hardship. (App. 8) The Board then noted the absence of health problems to the children and the lack of proof

that the children would not be able to receive an education in Mexico. (App. 8)

The Board stated that having considered all factors individually and cumulatively, Petitioner had not met his burden of proving exceptional and extremely unusual hardship and reversed the grant by the immigration judge. The matter was remanded to the immigration judge for consideration of voluntary departure, which was granted. However, the grant of voluntary departure, which was the subject of a second petition filed to ensure that there was no question of the finality of the order for review purposes, is not germane to the issues raised here.

There was a dissent by one of the three Board members.

REASONS FOR GRANTING CERTIORARI

As is expanded upon in the arguments below, certiorari should be granted in this case so that the Court may resolve differences between the circuits as to the de novo fact finding authority of the Board of Immigration Appeals. The Second, Third and Tenth Circuits have issued precedent decisions which interpret the relevant statute, 8 C.F.R. § 1003.1(d)(3)(i) quite differently than the conclusions reached here by the Ninth Circuit; these circuits require great deference to the factual findings of the immigration judge, and require the Board to state specifically why

the factual findings were clear error if they are not accepted by the Board.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE QUESTION OF THE BOARD'S AUTHORITY TO MAKE DE NOVO FINDINGS OF FACT IS OF EXCEPTIONAL IMPORTANCE AND THE PANEL DECISION CONFLICTS WITH THE LAW OF DIFFERENT CIRCUITS

A. Relevant Law on Board Review of Factual Findings

The Board's authority to review the factual findings of the immigration judge are circumscribed by regulation: "The Board will not engage in de novo review of findings of fact determined by the immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). The regulations grant the Board review on issues of law or discretion, but the factual findings of the judge serve as a limitation on the appellate review by the Board. If there is no clear error as to the relevant factual findings, then there will be no basis for finding abuse of discretion in finding that a legal standard has been met.

The Board recently held that under 8 C.F.R. § 1003.1(d)(3), it should defer to the factual findings of the immigration judge unless clearly erroneous, but the Board retains independent judgment and discretion, subject to the applicable governing standards regarding pure questions of law or application of a particular standard to the facts. The Board reached this conclusion in reliance upon the procedural reform regulations promulgated by the Attorney General known as Board of Immigration Appeals Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (August 26, 2002). Under these rules, the Board does not engage in de novo review and reviews the factual findings of the immigration judge only for clear error, but can review questions of law and application of law to facts. *Matter of A-S-B*, 24 I&N Dec. 496 (BIA 2008). The Board can weigh the evidence differently than the immigration judge or can determine that the evidence was not sufficient to support the judge's decision.

In this case, the Ninth Circuit stated merely that "We are unpersuaded by Luna-Hernandez's contentions that the BIA erred and violated due process by engaging in de novo review of the immigration judge's factual findings. See 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii)." (App. 3) The circuit court did not specify whether it denied that this was de novo review, or whether it believed that de novo review was authorized in this instance. The circuit court did not find that this was a reweighing, or that the Board correctly found that the evidence was insufficient.

The Board had found that Petitioner had failed to meet his burden for exceptional and extremely unusual hardship, but did not determine that the immigration judge's factual findings were in error. The immigration judge had found that in light of the children's status as members of a family of a respected and successful businessman in their community, combined with their lack of education in Spanish, their father being their sole support, the losses which would be significantly greater than in other cases, the close knit family, and the Petitioner's lack of adult experience in Mexico, the hardship burden was met. The Board did not conclude that any of these findings were error. The immigration judge gave great weight to the dramatic shift in standard of living immediately upon relocation, and damaged prospects for the future, which were greatly enhanced or severe because of the high degree of success Petitioner had achieved in this country, versus the limited options available in Mexico. The Board did not cite any authority holding that such factors could not support a finding of exceptional and extremely unusual hardship.

B. Precedent Decisions of the Second, Third and Tenth Circuits

In *Fen Yong Chen v. Bureau of Citizenship & Immigration Servs.*, 470 F.3d 509, 515 (2d Cir. 2006), the Second Circuit held that under the current regulations, the Board may not merely state that the immigration judge's findings were "clearly erroneous," and

that the Board's review of the immigration judge cannot be an independent assessment but must show appropriate deference to the immigration judge's findings. In *Guzman v. Holder*, ___ F.3d ___ (2d Cir. 2009) (08-2544 ag 6/2/2009), the Second Circuit, in reliance upon *Chen*, narrowed the Board's de novo authority further by precluding a reversal of the immigration judge by the Board where the Board relied upon facts not disputed by parties and not found by the immigration judge. That is essentially what occurred in this case, where the Board did not find the immigration judge's factual findings to be error, and instead, relied upon matters which were not in dispute and not found by the judge. For example, as is discussed above, the Board relied upon the absence of serious illness of the children, and the absence of any proof that the Petitioner and his wife would be unable to work or that the children would be unable to receive any education in Mexico. These were not disputed facts which were used in deciding the case by the immigration judge, and no findings were made on those issues as cancellation was not sought based on these claims.

The Third Circuit has held likewise. In *Filja v. Gonzalez*, 447 F.3d 241, 253 (3d Cir. 2006), that court held that under the current regulation, the Board is precluded from engaging in its own independent fact finding.

Additionally, the Tenth Circuit has held that under the current regulation, the Board may not re-weigh the evidence submitted on a clear error review

and simply replace them with its own version of the facts. *Kabba v. Mukasey*, 530 F.3d 1239, 1246 (10th Cir. 2008).

Under the law of the circuits cited above, the Board would be precluded from replacing the immigration judge's factual findings with its own factual findings, unless the Board found clear error and stated why there was clear error. The Board would be precluded from ignoring the facts found by the immigration judge, substituting its own factual findings, and then determining that the necessary burden of proof for relief had not been met. These decisions from other circuits correctly interpret and apply the regulatory limitations on de novo review, whereas the decision of the Ninth Circuit here does not, as it allows the Board to do precisely what the regulations preclude it from doing.

C. In Contrast to the Second, Third, and Tenth Circuits, the Ninth Circuit Has Not Enunciated a Rule of Regulatory Application to Guide the Board

The circuit court decision at issue here cites only the regulation in its rejection of Petitioner's claim that his due process rights were violated when the Board of Immigration Appeals engaged in de novo review of the facts. The case law in the Second, Third, and Tenth Circuits would preclude such action by the Board. The Ninth Circuit has not yet enunciated its precedent decision on this issue.

The Ninth Circuit based its de novo decision upon facts which were neither found, established, nor even raised. No one ever suggested that Petitioner's children could not receive any education at all, or that neither Petitioner nor his wife would ever find any employment in Mexico.

What occurred here was not reweighing or casting facts against the law. What occurred here was a rejection of the immigration judge's factual conclusion that these children would suffer a hardship significantly beyond that which is typical for the specific factual reasons the judge found. The Board simply disagreed, and ignored the judge's factual findings, substituting instead its own version of the facts.

The Board decides cases arising from all federal circuits, and the governing law in every case involving review of facts will be the same regulation at issue here.

Accordingly, the reversal of the grant of cancellation exceeded the Board's authority. Certiorari should be granted to achieve uniformity in what is a federal and national issue which should be decided uniformly in all circuits.

CONCLUSION

For the reasons set forth herein, certiorari should be granted.

Dated July 7, 2009 at San Francisco, CA.

Respectfully submitted,

LAW OFFICES OF STEPHEN SHAIKEN
STEPHEN SHAIKEN, ESQ.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN FRANCISCO LUNA HERNANDEZ,	Nos. 05-75259 06-73938
Petitioner,	Agency No. A076-841-591
v.	MEMORANDUM*
MICHAEL B. MUKASEY, Attorney General,	(Filed Nov. 25, 2008)
Respondent.	

On Petitions for Review of Orders of the
Board of Immigration Appeals

Submitted November 13, 2008**

Before: WALLACE, LEAVY, and THOMAS, Circuit Judges.

In these consolidated petitions, Juan Francisco Luna Hernandez, a native and citizen of Mexico, petitions for review of two Board of Immigration Appeals ("BIA") orders. Our jurisdiction is governed by 8 U.S.C. § 1252. We review de novo due process claims, *Ram v. INS,* 243 F.3d 510, 516 (9th Cir. 2001), and questions of law, *Fernandez-Ruiz v. Gonzales,* 468

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

F.3d 1159, 1163 (9th Cir. 2006). We dismiss in part and deny in part the petition for review in No. 05-75259 and deny the petition for review in No. 06-73938.

We lack jurisdiction to review the BIA's discretionary determination that Luna Hernandez failed to show exceptional and extremely unusual hardship. *See Martinez-Rosas v. Gonzales,* 424 F.3d 926, 930 (9th Cir. 2005).

We reject Luna Hernandez's contention that the BIA failed to consider all of the evidence. *See Fernandez v. Gonzales,* 439 F.3d 592, 603 (9th Cir. 2006) (petitioner must overcome presumption that the BIA reviewed the entire record to establish a due process violation).

Contrary to Luna Hernandez's contention, the BIA's interpretation of the hardship standard falls within the broad range authorized by the statutory language. *See Ramirez-Perez v. Ashcroft,* 336 F.3d 1001, 1004 (9th Cir.2003).

We are unpersuaded by Luna Hernandez's contentions that the BIA erred and violated due process by engaging in de novo review of the IJ's factual findings. *See* 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii).

Luna Hernandez has waived any challenge to the BIA's dismissal of his second administrative appeal. *See Martinez-Serrano v. INS,* 94 F.3d 1256, 1259-60 (9th Cir. 1996) (issues not specifically raised and argued in a party's opening brief are waived).

No. 05-75259: PETITION FOR REVIEW DISMISSED in part; DENIED in part.

No. 06-73938: PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 841 591 – San Francisco

Date: AUG 18, 2005

In re: JUAN FRANCISCO LUNA HERNANDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Martha L. Cordoba, Esquire

ON BEHALF OF DHS: James R. Knapp
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) timely appeals an Immigration Judge's January 21, 2004, decision granting the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). We find that the respondent has not established that his removal would result in exceptional and extremely unusual hardship to his

qualifying United States citizen children. Accordingly, the DHS's appeal will be sustained, and the case will be remanded to the Immigration Judge in order to establish the respondent's eligibility for voluntary departure.

In granting the respondent's application for cancellation of removal, the Immigration Judge reasoned that the respondent's children would face exceptional and extremely unusual hardship if they had to return to Mexico with their father because of the respondent's lack of formal education and the "lack of adult experience in Mexico [which would] seriously disadvantage him when trying to reestablish himself . . . either by starting a new business with whatever funds he liquid[ated] from his current assets or by seeking employment" (I.J. at 13, 16). The Immigration Judge noted the significant financial stake that the respondent gained in the United States and the "significant hardship" such a loss would have on the respondent's children. The Immigration Judge noted "the near impossibility that [the respondent] would face in establishing any [such] comparable economic stability in Mexico" (I.J. at 15). The Immigration Judge also asserted that the "children would be disadvantaged in the educational arena due to their lack of training in the Spanish language" which would disadvantage their ability to attend college in the United States (I.J. at 15). Finally, the Immigration Judge noted that the respondent's children would lose the advantages that flow from their father's "stature" in the community and the "closely knit

community" of family members who would remain in the United States (I.J. at 13).

On appeal, the DHS argues that the Immigration Judge erred in granting the respondent's application for cancellation of removal. The DHS contends that the respondent's children are healthy and can speak Spanish. The DHS argues that the "the respondent's 17 year-old recollections of rural life in Mexico are . . . insufficient to show that his children would suffer real setbacks, either in their schooling or otherwise." The DHS further contends that the Immigration Judge improperly relied on *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), in that, contrary to *Matter of Recinas, supra*, here the respondent has an intact nuclear family, including parents and siblings in Mexico, and significant assets. *Cf. Matter of Recinas, supra* (granted cancellation of removal to a single woman with limited financial resources, who had no immediate family remaining in Mexico, and was a mother of six children, all of whom were unfamiliar with the Spanish language).

In response, the respondent adopts and expands the Immigration Judge's reasoning. The respondent argues that, because of the children's lack of formal education in Spanish, the difficulty the respondent would face finding employment in Mexico, and the established family ties in the United States that would necessarily be broken if removed, the respondent's United States citizen children would suffer exceptional and extremely unusual hardship if the respondent was ordered removed.

In this case, the respondent's qualifying children are 12, 6 and 5-years-old. The respondent indicated that his children would accompany him if he is removed to Mexico. Regarding the respondent's ability to support his children if he is removed to Mexico, both he and his wife are in good health, and, as such, would physically be able to work to support their children. There is also no objective evidence in the record indicating that he or his wife could not find employment in Mexico. The Immigration Judge noted that the respondent claims over $1,000,000.00 in assets, including the equity in his home, equity in his business equipment, and good will associated with his business (I.J. at 11; Exh. 13). We note that these assets could help ease the family's transition to Mexico. *See Matter of Andazola*, 23 I&N Dec. 319, 324 (BIA 2002) (stating that the $7,000.00 an unmarried mother of two children had in her savings "would surely help [her] in establishing a new life in Mexico"). Moreover, whatever financial difficulties the children might encounter, or the loss of benefits that flow from the respondent's "stature" in the community in the United States, are not likely to be significantly different from those occasioned by removal generally, particularly to a country with a weaker economy and comparatively fewer employment opportunities. Adjustment to a lower standard of living generally will be insufficient, in and of itself, to support a finding of exceptional and extremely unusual hardship. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

Regarding the health and education of the respondent's three young children, neither child has any serious health concerns that militate against them relocating to Mexico. *Id.* (stating that cancellation may be appropriate where a qualifying child has "very serious health issues" or "special needs in school"). Furthermore, the children are bilingual, and there is no indication in the record that these children have any special needs. There is insufficient evidence in the record to establish that the respondent's children would not be able to receive an education in Mexico. *See Matter of Andazola, supra* (finding that the respondent did not establish eligibility for cancellation of removal because of diminished educational opportunities in Mexico).

Finally, we acknowledge the respondent's familial ties in the United States. However, the respondent's children also have many relatives living in Mexico, including the respondent's parents and siblings. Moreover, the respondent's wife and children's mother, who currently resides in the United States, was granted voluntary departure to Mexico in 1998, although she had yet to depart (I.J. at 2). As such, there is nothing to indicate that the respondent or his children would be without any familial support. *See Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998).

Therefore, considering all of the factors presented individually and cumulatively, we find that the respondent has not met his burden of establishing that his United States citizen children would suffer exceptional and extremely unusual hardship if he is

removed to Mexico. The respondent has not provided evidence to establish that his qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the removal of an alien with close family members here. *See Matter* of *Monreal, supra.*

Based on the foregoing, we find that the respondent has not demonstrated eligibility for cancellation of removal under section 240A(b) of the Act. However, the issue of whether the respondent is eligible for voluntary departure is unresolved. Although the respondent asked for voluntary departure if he was ordered removed, he was never qualified for this form of relief at his individual merits hearing. Therefore, in light of *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), we will remand the record of proceeding to the Immigration Judge for the sole purpose of considering the respondent's eligibility for voluntary departure or, in the alternative, for entering a final order of removal.

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The Immigration Judge's grant of cancellation of removal is reversed.

FURTHER ORDER: The record is remanded to the Immigration Judge.

/s/ [Illegible]
FOR THE BOARD

Board Member Juan P. Osuna respectfully dissents without separate opinion, and would affirm the Immigration Judge's finding that the respondent's United States citizen children would face exceptional and extremely unusual hardship if the respondent were removed to Mexico.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File A 76 841 591 January 21, 2004

In the Matter of

JUAN FRANCISCO LUNA HERNANDEZ,)
Respondent) IN REMOVAL PROCEEDINGS

CHARGE: INA Section 212(a)(6)(A)(i) – entry without inspection.

APPLICATIONS: Cancellation of removal under INA Section 240A(b)(1) and voluntary departure.

ON BEHALF OF RESPONDENT:
Julie Bachman
P.O. Box 7233
State Line, Nevada 89449

ON BEHALF OF DHS:
James Knapp
DHS
Assistant Chief Counsel
550 Curney St., Ste. 1000
San Francisco, California
94108

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

(Filed Nov. 2, 2004)

PROCEDURAL HISTORY

The respondent is a 32-year-old married male, native and citizen of Mexico. He entered the United

States in 1987 by crossing the border without inspection at or near San Yisdro, California. On December 12th, 1997 the respondent submitted an application for asylum with the assistance of an immigration preparer to the asylum office of the Immigration and Naturalization Service. The INS did not grant the application and referred it to the Immigration Court with the issuance of a Notice to Appear that was filed with the Court on February 6th, 1998.

The respondent appeared before this Court with counsel on February 24th, 1998. On that date he admitted the allegations in the Notice to Appear and conceded removability. Respondent declined to designate a country or removal and the Court directed that Mexico be the country of removal should that become necessary. The matter was set over to an individual hearing which was held on February 19th, 1998. At that hearing, respondent withdrew his application for asylum, which was apparently filed for the sole purpose of placing respondent in removal proceedings so that he could request the relief of cancellation of removal. This relief is available only in removal proceedings.

Respondent's wife was also placed in removal proceedings and at the hearing on February 24th, 1998 at the insistence of government counsel, her case was severed and she was granted voluntary departure for a period of 120 days. She has never departed the United States, despite having received an order to present herself for removal. ~~And~~ She continues to live with the respondent.

The testimony was not complete at the initial hearing and a second hearing was held on March 21st, 2001, at which time respondent's testimony was continued. ~~And~~ A third hearing was held on January 24th of 2004, today, when respondent's testimony was completed and the documents were moved and marked into the record. This decision is based on all of the testimony and evidence in the record.

CREDIBILITY AND FACTUAL FINDINGS

This Court carefully observed respondent's demeanor while he testified. Respondent has always testified in the English language without the assistance of an interpreter. Respondent's testimony was candid and forthright and also without hesitation. His testimony was consistent with the information provided in his application for cancellation of removal as well as consistent with his supporting documents. Many aspects of his testimony were corroborated by his supporting documentation. For these reasons, the Court finds respondent to have testified credibly and will afford his testimony full evidentiary weight. In arriving at this decision, the Court will adopt the respondent's testimony as its findings of fact.

CANCELLATION OF REMOVAL

The respondent is seeking the primary relief of cancellation of removal under INA Section 240A(b)(1). To be eligible for cancellation the respondent must show that he has not been convicted of specified

offenses, that he has been continuous physical presence in the United States for a continuos period of 10 years, that he has been a person of good moral character during this 10 year period and that his removal would result in exceptional and extremely unusual hardship to his qualifying relatives, in this case his three United States citizen [children]. Finally, the respondent must prove that he deserves the relief in the exercise of discretion.

The respondent testified about two traffic encounters with police in the United States and the Government [and court] concludes that the respondent is a person of good moral character and not subject to any disqualifying criminal convictions.

Respondent credibly and consistently testified that he entered the United States in May of 1987. He provided evidence in the form of 1988 driver's license. In addition, respondent provided Exhibit 7, which is a letter from his employer verifying the employment of an individual named Rogelio Ramirez during the period from August 19th, 1987 through February 3rd, 1993. Respondent testified that he was employed under this name as a method of working without employment authorization. Respondent also provided a rental agreement dated September 26th, 1997 in his own true name, showing that he lived in King's Beach, California, which is very close to the Hyatt hotel he worked in in Incline Village in Nevada.

The entire record taken as a whole convinces the Court that the respondent has lived in the United

States continuously from the time of his initial entry in May of 1987 up to and including today's date. The respondent has met his burden of demonstrating over 10 years of continuous physical presence in the United States prior to the issuance of the Notice to Appear.

The record amply demonstrates that the respondent is a person of good moral character who has been a responsible and caring parent to his three United States citizen children and an upstanding citizen of his local community. Respondent has been active in the ~~armature~~ amateur soccer community, including serving as a coach for the team of his older son. He is a member of a church, which he has attended consistently and whose pastor wrote a letter, which is part of the record.

Respondent was questioned extensively about his tax records and explained his pattern and practice of filing taxes and has also demonstrated [(]with his more recent history[)] that once apprised of the legal and other requirements of the law he abundantly complies[d] with those requirements. His presence in the United States has not been a social or financial burden to his community or to [t]his country. One of his children's birth was paid by public funds. Another child's birth was paid over a period of time by the respondent.

Respondent was also questioned extensively about the failure of his wife to depart the United States voluntarily after being granted the right to do

so. The Court concludes that any negative conclusion based on her failure to depart should not be attributed to the respondent, as he indeed testified that she is an independent human being who made her own decision about remaining beyond the date ordered by this Court.

Having met the physical presence and good moral character requirement[s], the respondent still must demonstrate that his removal would result in exceptional and extremely unusual hardship to his two three United States citizen children. To meet this burden, an applicant for cancellation of removal must demonstrate that his child or children, who is a citizen of the United States or a lawful permanent resident, would suffer hardship that is substantially beyond that which would ordinarily be expected to result when a close family member leave the country. *Matter of Monreal,* 23 I&N Dec. 56, 62 (BIA 2001).

Since Congress amended the prior existing remedy of suspension of deportation and created the relief of cancellation of removal under INA Section 240A(b)(1)(B), the Board of Immigration Appeals has issued three important guiding precedent decisions. They are *Matter of Monreal supra*; *Matter of Andazola-Rivas,* 23 I&N Dec. 319 (BIA 2002); and *Matter of Recinas,* 23 I&N Dec. 467 (BIA 2002). It is clear from these decisions that the nature of cancellation of removal is extremely fact specific, but the case law provides some insight into factors which should be considered and the weight accorded them.

The factors to be considered in evaluating hardship include those which were traditionally weighed in suspension of deportation cases, although the plain meaning of the term "exceptional and extremely unusual" mandates a showing of harm substantially beyond that which would ordinarily be expected to result from deportation. *See Matter of Monreal, supra,* at 59 (BIA 2001).

To assess hardship, the factors to consider include, respondent's family ties in the United States and abroad, the length of residence in the United States, the applicant's health as well as the health of qualifying family members, his financial status, business or occupation; the possibility of other means of adjustment of status; and his community ties, that is his position in the community. *See Matter of I-E-G-,* 20 I&N Dec. 801 (BIA 1994); *Matter of Anderson,* 16 I&N Dec. 596 (BIA 1978); *Matter of O-J-O-,* (BIA 1996).

In *Monreal* the BIA particularly noted that a respondent with a qualifying child who has very serious health problems would be a strong applicant. Economic conditions in respondent's homeland are relevant and have been found to justify suspension of deportation if factors combine with economic detriment to make deportation extremely hard on the respondent or qualifying relative. *See Matter of Ige, supra.*

Neither economic detriment, a severe reduction in the standard of living, nor the loss of a job, standing alone, constitutes extreme hardship. While economic loss alone does not constitute extreme hardship,

the personal and emotional hardships which flow naturally from economic losses, such as decreased health care, educational opportunities and general material welfare must be considered. All relevant factors, although not extreme in themselves, must be considered in the aggregate to determine whether hardship exists. The cumulative effect of several factors may support a finding of hardship where no individual factor alone would suffice.

The BIA found in *Matter of Monreal* that respondent's two U.S. citizen children, who were 12 and 8 years old, would suffer some hardship from relocating Mexico and would likely have fewer educational opportunities. The Board concluded that these difficulties were not substantially different from or beyond that which one would normally expect from the deportation of an alien with close family members.

The Board further noted that *Monreal*'s lawful permanent resident parents did not provide evidence of particular health problems or other factors suggesting exceptional and extremely unusual hardship to them if *Monreal* were required to leave. Monreal's wife and youngest child, an infant born in the United States, were already living in Mexico, as well as a brother of Monreal, who worked for their uncle's business where Mr. Monreal had also previously worked for 10 years. Based on all of the circumstances, the Board found that Mr. Monreal would be reunited with family members and would be able to work and support his United States citizen children in Mexico. The Board concluded, therefore, that Mr.

Monreal failed to meet the burden of showing exceptional and extremely unusual hardship.

In *Matter of Andazola,* a single mother with two healthy United States citizen children who were ages 11 and 6 was also found unable to establish exceptional and extremely unusual hardship. Ms. Andazola had no family members, except her children, living lawfully in the United States. She had no family members in Mexico to aid her reintegration there. However, she had accumulated significant assets which would serve to ease her transition to Mexico.

In contrast, in *Recinas,* the BIA found that a divorced mother of six (four of whom were native born U.S. citizens) had demonstrated exceptional and extremely unusual hardship would flow from her removal. Ms. Recinas had no immediate family remaining in Mexico and limited financial resources. Her parents were lawful permanent residents of the United States and five of her siblings were United States citizens. Ms. Recinas provided the sole source of financial support to her six children by virtue of her self-employment in a vehicle inspection service. She had a close relationship with her lawful permanent resident mother, who served as a caretaker for her children and lied nearby. Two of the children could not read or write Spanish and spoke it only with difficulty. Finally, due to a significant visa backlog from applicant's from Mexico, Ms. Recinas had no alternative mode of immigrating to the United States in the foreseeable future, despite having so many strong family ties.

The Board found the degree of hardship appreciably greater than in *Monreal* and *Andazola* and concluded that Ms. Recinas had met her statutory burden.

The Court concludes that the facts in the instant case are more similar to the facts in *Matter of Recinas* than to those in *Matter of Monreal* or *Matter of Andazola*. In this case, the respondent entered the United States at a very young age, having completed only sixth grade in Mexico. He was the oldest child of his family and his family was unable to pay the costs that were required to continue his education after the sixth grade. After working for some years in the United States the respondent began attending high school and studied for several years without graduating, but did participate in extracurricular activities, including athletics and public service or volunteer activities involving counseling of younger students.

In April of 2000 the respondent took over a landscaping business which he purchased for $10,000. This price included a client list and ~~a~~ [the] good will generated with those clients as well as some smaller pieces of landscaping equipment. Based on his testimony and evidence submitted, ~~the income generated from this business in year 2002,~~ the gross income generated from this business in year 2002, was over $600,000 and the income from that to the respondent was nearly $150,000. Respondent paid nearly $35,000 in taxes on his income and has generated several jobs as a result of his business. His wife does not work,

other than in the upbringing of their three children and caring for their home.

The respondent owns a home and, according to documents he submitted recently, and marked into the record as Exhibit 13, respondent's assets amount to nearly one million dollars in value, including the equity in his home, the good will in his business and the equity in the equipment purchased in order to ~~rent~~ [run] his business.

~~Respond'ent's,~~ i[I]n addition to respondent's three United States citizen children, he has many family members living in his same community in the United States. Respondent's mother-in-law and father-in-law are lawful permanent residents and live in the United States. Respondent's uncle is a United States citizen and is living in the United States nearby. Respondent's brother-in-law Mario is a United States citizen and the respondent's children have approximately 10 cousins, all of whom are U.S. citizens and all of whom interact frequently with the respondent and his qualifying relative children. Respondent's U.S. citizen brother-in-law Mario filed a petition for respondent's wife in 1995, which petition was approved[.] ~~but~~ a[A]though more than eight years have passed[,] because of the backlog in immigrant visas from Mexico, it is several years away from resulting in a visa for his wife or the respondent. Respondent's brother is a lawful permanent resident and lives in the same town that the respondent does and sees the respondent frequently. Respondent's grandfather was a lawful permanent resident and at one point was

seeking naturalization but he died during the course of these proceedings.

Respondent's three children are five, six and 12 years old. The oldest child, Juan, is in fifth or sixth grade and the daughter Alondra is in first grade. The youngest child, Kassandra, is five years old and attends pre-school. All of these children speak English as well as Spanish and their education, [()]as it is up to this point,[)] has been in the English language. The children can speak some Spanish but have never been taught to read or write Spanish and only the oldest child, Juan, is of an age where reading and writing would be at a significantly advanced level. Alondra is in first grade and is learning to read and write English at this point and it not being taught to read or write Spanish. Kassandra is in pre-school. Her classes and teachers speak to her in English.

Respondent was featured in a news article that is part of the record at Exhibit 11, page or item 2. He is in a news article from North Lake Tahoe featuring his long experience coaching soccer and participating in soccer in the Lake Tahoe area. The article indicates that he began coaching before his own son was old enough to play and describes his beginning business.

The entire record convinces the Court that this respondent has established himself as an integral member of a small community where he has been able to thrive financially and support his children socially. He lives in a closely knit community of close

relatives and in-laws who interact with him and his children on a regular basis. ~~And~~ t[T]he Court concludes that, like the respondent in *Matter of Recinas*, the harm to respondent's children if he were removed to Mexico amounts to exceptional and extremely unusual hardship.

The three children, especially Juan at age 12, would necessarily experience some difficulty transitioning from their life in the United States to a new life in Mexico. Such difficulty would correspond to any move from one community to another but, in this case, it would be compounded by the respondent's lack of experience of adult life in Mexico. In considering hardship the U.S. citizen children will face in Mexico, the Court must also consider the burden on the entire family that would result when this respondent must support his entire family in the Mexican environment. The respondent's lack of adult experience in Mexico will seriously disadvantage him when trying to re-establish himself in Mexico, either by starting a new business with whatever funds he's able to liquify from his current assets or by seeking employment.

In addition, it is significant that the respondent and his children are part of a closely knit family community of cousins, uncles and grandparents who are living lawfully in the United States. Although the respondent's wife and the mother of these children is not lawfully in the United States and could be subject to immigration enforcement, her parents, the grandparents of the children, are lawfully here and are part

of the children's community. Despite the many family members living lawfully in the United States, the respondent's prospects for lawful immigration are somewhat remote, due to the lengthy backlog. ~~And~~ e[E]ven though respondent's wife is the beneficiary of a fourth preference visa petition filed in 1995, this petition will not likely result in a visa for the respondent or his wife for several years into the future.

As in *Matter of Recinas*, the respondent has raised his family in the United States since he married in 1990 and his three United States children know no other way of life. They speak some Spanish but are unable to read and write that language. And the children have never traveled to Mexico, according to the record.

Unlike the children in *Matters of Monreal* and *Andazola,* in this case respondent's three children depend entirely on this respondent for financial support. Respondent's wife is present in the home and ~~is~~ her presence undoubtedly allows Mr. Luna to actively develop his business. If they were return to Mexico, the children would face increased hardships due to the burden that naturally will follow their parents[']~~to~~ [need to] establish themselves financially[,]~~and~~ economically and socially in Mexico.

The respondent has provided a warm and loving home for his children in an extended family environment in the Lake Tahoe area and his ability to provide for the social and community needs of his

children upon returning to Mexico would also be reduced and diminished.

Just as in *Matter of Recinas*, from the perspective of the three United States citizen children, it is clear that a significant hardship will result from the loss of the economic stake that Mr. Luna has gained in this country.[,] Couple[d] with the near impossibility that he would face in establishing any comparable economic stability in Mexico. Although Mr. Luna is not a single parent, he is solely financially responsible for ~~their~~ well-being. [of the qualifying relatives.]

In considering the totality of the hardship factors, the Court concludes that the respondent has met his burden of proving that ~~his~~ [his] children would suffer exceptional and extremely unusual hardship. The children would be disadvantaged in the educational arena by their lack of training in the Spanish language, particularly in its written form. This disadvantage would extend to their ability to attend college in the United States if they were to return to Mexico now and continue their education in the Spanish language rather than continue to receive education in English. The children would not only lose their place in the community of which they are an integral part but also lose many family connections with whom they frequently interact.

The children would lose the advantages that they will undoubtedly continue to receive if they remain in the United States of their father's business success and the financial success and community stature that

flows from his successful business. The possibility of replicating this level of success in a community in Mexico is not certain by any means on this record, noting especially respondent's lack of formal education, which would allow him to attain in Mexico the levels of ~~education and~~ standing in the community that he will be able to achieve in the United States. All of these factors together, in the opinion of this Court are sufficient to meet the exceptional and extremely unusual hardship standard.

The Court finds that the respondent has satisfied all of the statutory requirements for cancellation of removal under INA Section 240B(b)(1) of the Act. The Court is impressed with respondent's good moral character and dedication to his children and his community. In the absence of any adverse factors which would preclude a favorable exercise of discretion, the Court will grant respondent's application for cancellation of removal in the exercise of discretion.

Based on the foregoing, the following is the Court's order.

IT IS HEREBY ORDERED that the respondent's request for cancellation of removal and adjustment of status pursuant to Section 240A(b)(1) of the Immigration and Nationality Act be granted.

/s/ Laura L. Ramirez
LAURA L. RAMIREZ
Immigration Judge 1-3-05

IMMIGRATION COURT
550 KEARNY ST., SUITE 800
SAN FRANCISCO, CA 94108

In the Matter of	Case 76 841 591
Juan Francisco Luna Hernandez	IN REMOVAL PROCEEDINGS
Respondent	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1-24-09. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternative order of removal to _____.

[x] Respondent's application for asylum was ( ) granted ( ) denied (x) withdrawn ( ) other.

[x] Respondent's application for withholding of removal was ( ) granted ( ) denied (x) withdrawn ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[x] Respondent's application for cancellation of removal under section 240A(b) was (x) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for adjustment of statue under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246 of the INA.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] At a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Appeal: A / ☒ / B

Appeal due by: 2-20-09

Date: 1-21-09 /s/ Laura L. Ramirez
Laura L. Ramirez
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [ ] PERSONAL SERVICE [x]

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [x] ALIEN'S ATTY/REP [x] INS

DATE: 1-21-09 BY: COURT STAFF [/s/ LLR]

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ]

LLR/[illegible]/rdb

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN FRANCISCO LUNA HERNANDEZ, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General Respondent.	Nos. 05-75259 06-73938 Agency No. A076-841-591 ORDER (Filed May 20, 2009)

Before: WALLACE, LEAVY, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.